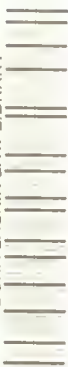


BORA LASKIN LAW LIBRARY



3 1761 04856 5220

THE CHARTER OF RIGHTS
AND
THE CANADIAN LEGAL CULTURE

[John Whyte]

Storage


KE
4381.5
.W59
2001
c.1

BORA LASKIN LAW LIBRARY

JUN 12 2001

FACULTY OF LAW
UNIVERSITY OF TORONTO

THE CHARTER OF RIGHTS
AND
THE CANADIAN LEGAL CULTURE



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

<https://archive.org/details/charterofrightsc00why>

THE CHARTER OF RIGHTS AND THE CANADIAN LEGAL CULTURE

COURSE INTRODUCTION

"In these lectures, I am going to talk about a fundamental change that has come over us in our lifetime. I'm calling this change the rights revolution ...". So begins Michael Ignatieff's 2000 Massey Lectures. (see, M. Ignatieff, *The Rights Revolution* (Toronto Anansi, 2000) at 1.) A statement of this boldness is bound to be partially right and partially wrong. Did rights discourse truly gain political primacy in the 1960's which is Ignatieff's temporal location of this phenomenon? Has talk of rights created a fundamental shift in our political practices and in our sense of political legitimacy? Has the rights concept produced a social transformation? Has the political practice of rights based claims changed our notions of state, community identity or self?

One can certainly wonder if Ignatieff's claim is too focussed in terms of locating the rights phenomenon and too grand in describing the effect of rights. Rights and the specific values closely connected with the rights project (equality, for instance) have distant antecedents and, now that rights is in general political currency, it seems a somewhat attenuated and, perhaps, contingent feature of our political landscape.

However, Ignatieff is right in one way that matters to this seminar. He identifies rights as another political idea, one more cultural artifact. Furthermore, he is right in recognizing the political attractiveness of the rights concept for most people in liberal democratic states.

The idea of rights *is* an idea with considerable political charm. Notwithstanding the view of some that rights and its attendant instrument -- judicial supervision of a class of political choices -- introduces mayhem and incoherence into the operation of our most basic political precepts, my sense is that rights, in fact, play some role of preserving state civility, legitimating political authority, liberating human spirit, and preserving cultural communities that are vital to human strength and well-being. But, then again, I could be just another victim of cultural conditioning, no more able to deconstruct the power effects of rights than I am able to dismiss the value of markets.

THE SEMINAR

The point of this seminar is to form a point of view on rights that is both as detached as possible and as connected to wider developments in our political and cultural landscapes. Simple questions can lead to complex answers. Where did the rights idea come from? How do we use the concept? What interests are served by rights? How do we provide substantive content to the rights instrument? Is the rights instrument politically distinctive? How does it fit within other elements of our political culture?

Our approach will only partially be focussed on intellectual anthropology (or political science).

For half the sessions, sessions 4, 5 and 6, we shall explore the effect of the constitutional

entrenchment of rights on Canadian law and Canadian politics through looking at substantive Charter law with respect to three basic rights issues -- limitations on rights, equality and liberty. The objective of these sessions is to understand what Canadian law prescribes through rights application so that we can assess such things as the weight of rights on, or the vitality of rights in, both the legal processes and political processes of our state.

REQUIREMENTS

For each session, you should read the readings in this materials book and as many relevant Charter cases as seem useful. At the end of each class, we will spend a little time identifying cases from Macklem et al. *Canadian Constitutional Law* (2d edition) -- the blue book -- and from Choudhry et al, *Constitutional Law Supplementary Materials* (Spring, 2001) -- the yellow book (**Please buy this book for this seminar.**) -- that should be read for the next class.

For the first session, I would like you to do a very small exercise (besides reading the two articles that are reprinted in this book for this session). This is the assignment: Pick a single short passage in any Charter case that particularly appeals to you -- or particularly horrifies you -- and, after identifying it, write a paragraph or two explaining the basis for your approval -- or disapproval.

The purpose behind this assignment is so that we can begin our legal and political cultural studies

by examining ourselves. My sense is that each of us brings to our study of rights already established beliefs about good states and about good statecraft -- things that in state organization we believe to be good in that they are productive of outcomes we value and things that we believe to be destructive of outcomes we want political society to achieve. Before we begin to explore why we might have formed the statecraft preferences that we have, it is useful to attempt to discover where our actual commitments lie.

The other **requirement for this seminar**, apart from participating in classes, is to prepare a 2000-3000 word paper on any topic relating to rights that you wish. I will be asking you to submit a paper proposal during the first week of the seminar for my comments.

The seventh and last session will consist of brief presentations (5 - 8 minutes) describing the central question, or central issue, or central thesis, or central insight that drives your short essay and what particular, illuminating analyses you have brought to bear, or are about to bring to bear, or hope to bring to bear, on this problem, issue, insight or thesis.

TABLE OF CONTENTS

Session 1	NATURE OF RIGHTS		
*	Allan Gewirth, "The Epistemology of Human Rights" in Paul, Paul and Miller, eds., <i>Human Rights</i> (Oxford : Blackwell, 1984).		
*	William A. Galston, "Practical Philosophy and the Bill of Rights: perspectives on some contemporary issues" in Lacey and Haakonsen, eds., <i>A culture of rights: The Bill of Rights in philosophy, politics and law--1791 and 1991</i> (Cambridge: Cambridge University Press, 1991).		
Session 2	A) GROUP RIGHTS		
*	Charles Taylor, "The Politics of Recognition" in <i>Multiculturalism and "The Politics of Recognition"</i> (Princeton: Princeton University Press, 1994).		
*	Will Kymlicka, <i>Multicultural Citizenship: A Liberal Theory of Minority Rights</i> (Oxford: Clarendon Press, 1995).		
	B) RIGHTS POLITICS		
*	Bruce Ackerman, <i>We the People: Foundations</i> (Cambridge, Mass.: Harvard University Press, 1991).		
Session 3		INTERPRETATION	
*		Lawrence Lessig, "Fidelity in Translation" (1993) 71 Tex. L. Rev. 1165.	
*		Ronald Dworkin, <i>Taking Rights Seriously</i> (London: Duckworth, 1977).	
Session 4		LIMITATIONS ON RIGHTS	
*		Leon Trakman, William Cole-Hamilton and Sean Gatiien, "R. v. Oakes 1986-97: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83.	
Session 5		EQUALITY	
*		Craig D. Bavis, "Vriend v. Alberta, Law v. Canada, Ontario v. M. and H.: The Latest Steps on the Winding Path to Substantive Equality" (1999) 37 Alta. L. Rev. 683.	
Session 6		LIBERTY AND RELIGION	
*		Paul Horwitz, "The Sources and limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U. T. Fac. L. Rev. 1.	
*		Diana Belevsky, "Liberty as Property" (1995) 45 U.T.L.J. 209.	
*		Eric Mack, "Liberalism, Neutralism, and Rights" in Pennock and Chapman, eds., <i>Religion, Morality and the Law: Nomos XXX</i> (New York and London: New York University Press, 1988).	

